SUPREME COURT OF QUEENSLAND

CITATION:	*R v Koani* [2016] QCA 289
PARTIES:	**R** **v** **KOANI, Christopher Charles** (appellant)
FILE NO/S:	CA No 287 of 2015 SC No 67 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 4 November 2015
DELIVERED ON:	11 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2016
JUDGES:	Margaret McMurdo P and Gotterson JA and Atkinson J Joint reasons for judgment of Gotterson JA and Atkinson J; separate reasons of Margaret McMurdo P, dissenting
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant pleaded guilty to manslaughter, but was convicted of murder, after killing his girlfriend with a shotgun from close range – where evidence was led at trial that the shotgun could have discharged when the hammer was only partly cocked – where the learned trial judge directed that, if the jury were not satisfied beyond reasonable doubt that the discharge of the shot which killed the deceased was by a willed act, a conviction of murder could still be obtained if they were satisfied beyond reasonable doubt that the duty in s 289 of the *Criminal Code* was raised and was breached by the appellant and, at the time the shotgun discharged, the appellant had an intent to kill or cause grievous bodily harm to the deceased – where the appellant submits that such a path to conviction of murder should not have been left to the jury – whether the trial judge misdirected the jury by leaving this path to conviction for the jury's consideration EVIDENCE – ADDUCING EVIDENCE – WITNESSES – GIVING EVIDENCE – EVIDENCE-IN-CHIEF AND RE-EXAMINATION – RE-EXAMINATION – where the appellant contends that inadmissible evidence was led at trial in re-

examination of a prosecution witness of a prior consistent statement made in a statement to police tendered at committal under s 110A *Justices Act* 1886 (Qld) – where the evidence concerned what the appellant said prior to shooting the deceased – where the appellant contends the re-examination was not about testimony on which the witness was cross-examined – where the witness was cross-examined about his "evidence in the Magistrates Court" – where the re-examination fairly prevented leaving the jury with a false impression of the totality of the witness' evidence – whether admitting the evidence in the course of re-examination occasioned a miscarriage of justice

Criminal Code (Qld), s 23, s 285, s 288, s 289, s 291, s 300, s 302, s 303, s 668E(1A)
Justices Act 1886 (Qld), s 104, s 110A

Humphries v The King [1943] St R Qd 156, cited
Murray v The Queen (2002) 211 CLR 193; [2002] HCA 26, considered
R v Clark (2007) 171 A Crim R 532; [2007] QCA 168, cited
R v Demirian [1989] VR 97; [1989] VicRp 10, cited
R v MacDonald & MacDonald [1904] St R Qd 151, cited
R v Phair [1986] 1 Qd R 136, cited
R v Young [1969] Qd R 417, cited
Royall v The Queen (1991) 172 CLR 378; [1991] HCA 27, cited
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, cited
Ugle v The Queen (2002) 211 CLR 171; [2002] HCA 25, cited
Wentworth v Rogers (No 10) (1987) 8 NSWLR 398, cited
Wojcic v Incorporated Nominal Defendant [1969] VR 323; [1969] VicRp 40, cited

COUNSEL:	A J Edwards for the appellant M R Byrne QC for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant, Christopher Koani, was charged with murdering his de facto partner, Natalie Leaney. It was common ground that the appellant unlawfully killed the deceased who died from a single gunshot wound to the head between 8.00 pm and 8.30 pm on 10 March 2013. At the commencement of his trial, prior to the jury's empanelment and in the presence of the whole panel, he pleaded not guilty to murder but guilty to manslaughter. The prosecution did not accept that plea in satisfaction of the indictment. After a six day trial the jury convicted him of murder. He has appealed against his conviction on two grounds. The first is that the trial judge erred in directing the jury they could consider an alternative basis for conviction of murder in the event they were not satisfied the shot was discharged by the appellant's willed act. The second is that her Honour erred in permitting the prosecution to re-examine Shea Fenton in order to prove a prior consistent statement.

[2] Before discussing these grounds of appeal it is helpful to summarise the prosecution particulars of the charge, the evidence, relevant aspects of the judge's directions to the jury and the applicable provision of the *Criminal Code* (Qld).

The prosecution particulars

[3] The prosecution particularised its case of murder as the appellant unlawfully killing the deceased by either:

1. (a) deliberately causing a gun to discharge; and

   (b) as a result, the deceased suffered injuries which resulted in her death; or

2. breaching a duty required of him in that –

   (a) he was in charge of and/or control of a dangerous thing, namely a gun; and

   (b) he failed to use reasonable care and/or take reasonable precaution in relation to the use and/or management of the gun; and

   (c) as a result of his failure the gun discharged; and

   (d) the deceased suffered injuries which resulted in her death.

   and in either case he did so with intent to cause the death of or grievous bodily harm to the deceased.[1]

The evidence

[4] The prosecution case was that the appellant shot the deceased in their home during the course of an argument whilst he was handling a modified shot gun. His guilty plea was on the basis that he was criminally negligent under s 289 *Criminal Code* in handling the weapon.

[5] On Thursday 7 March 2013, Brendan Lalot, an acquaintance of the appellant, visited the appellant's unit. The appellant showed him a cut down shotgun. Mr Lalot handled the gun himself but "couldn't really get it working." The appellant demonstrated how it locked back and the barrel opened up.[2]

[6] On Friday 8 March, the deceased told her former boyfriend's sister, Margaret Sekona, that she had had a fight with the appellant who told her to pack her things. She thought their relationship was over and she wanted to leave him but was concerned that, if she did, he would take her property. On Saturday 9 March, she told Ms Sekona that she was having a friend put new locks on the unit and that the appellant had been staying in a motel.[3] She asked Ms Sekona's father if she could stay at his house and move her belongings; she planned to wait until the appellant was home as he took her unit key.[4]

[7] Megan Elphick, a friend of both the appellant and the deceased, said that the couple's relationship worsened close to the time of the deceased's death. Ms Elphick spent Friday night with the appellant at a motel. He said he was having problems with the deceased talking to her former boyfriend; he had "caught her out" and "found out about her screwing around." She had previously seen the appellant pull apart and disengage a sawn-off shotgun.[5]

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1 MFI G, AB 562.
2 T3-14 – T3-15, AB 202 – 203.
3 T2-58 – T2-59, AB 143 – 144.
4 Exhibit 28, AB 506.
5 T2-65, AB 150.

[8] On Saturday, the deceased told a work colleague, Rebecca Fernan, that she and the appellant had had a huge fight the previous day. He had moved out and taken the house keys and her mobile phone. The following day she sent a text message to Ms Fernan stating that she would not be in on Monday and to let her employers know.[6]

[9] Shane Writer and his partner Jennifer Pollitt were friends of both the appellant and the deceased. They stayed at their unit on Saturday and they all used illicit drugs. They did not use drugs on Sunday. At the time Ms Pollitt had a serious ice habit.[7]

[10] Ms Jessica Quinn also stayed at the unit on the Saturday night during which she smoked ice. She assumed the appellant was smoking ice. She did not see Mr Writer or Ms Pollitt smoke ice; she did not see the deceased use any drugs; the deceased was in her room most of the night. Ms Quinn left the following morning.[8]

[11] At about 4.00 pm on Sunday afternoon, the deceased went outside for a smoke and Ms Pollitt followed her. She told Ms Pollitt that she planned to leave the appellant. She was crying and said she had had enough; she had no friends and no longer saw her family. Later that afternoon, the appellant, Mr Writer and Ms Pollitt went to the Springwood Hotel. The deceased had planned to visit a doctor to obtain a certificate but she rang Ms Pollitt and told her that the appellant had locked her in the unit.[9] The deceased and the appellant then exchanged mutually abusive and angry text messages which showed that the deceased was concerned that she was unable to get to the police station to sign the bail book as required under the terms of her bail. She emphasised that the unit lease was in her name and she had paid the bond.[10] The appellant returned to the unit ahead of Mr Writer and Ms Pollitt. By the time they arrived outside the unit, the door was closed and they heard the appellant and the deceased arguing.[11] Mr Writer sent a text message to the appellant telling him to "take it easy, bro".[12]

[12] Earlier that evening the deceased had sent a text message to Shea Fenton asking him to pick her up from the unit. Mr Fenton then called the appellant and discussed the purchase of drugs. He arrived at the unit to buy drugs about 20 minutes after that text message.[13]

[13] Mr Fenton gave evidence that when he arrived at the unit he knocked on the door but was not let in for about 10 minutes.[14] Mr Fenton and Mr Writer entered the unit while Ms Pollitt waited outside. As Mr Fenton entered, the deceased moved and sat at the end of a table towards the rear of the unit. The appellant was sitting on a couch near the front door. A broken vase was on the floor.[15] He heard the appellant say that he would rather "go back to jail or something, I'll shoot you."[16] He saw the appellant pick up a sawn-off shot gun and cartridges from some shelving, open the barrel and load the gun.[17] They were still fighting. The appellant said, "I don't give a fuck, I'll kill you. I didn't – I'll go to – doesn't care – I'll go back to jail". He then walked

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6 T2-62, AB 147.
7 T4-37, AB 306.
8 T2-73 – T2-75, AB 158 – 160.
9 T4-28, AB 297.
10 Exhibit 12, AB 498 – 499.
11 T4-8, AB 277; T4-29, AB 298.
12 Exhibit 13, AB 503.
13 T3-17, AB 205.
14 T3-18, AB 206.
15 T3-19, AB 207.
16 T3-20, AB 208.
17 T3-21, AB 209.

towards the table out of Mr Fenton's sight. Mr Fenton heard the gun fire. He walked into the lounge and saw the deceased had been shot. The appellant had dropped the gun and was yelling for help.[18] In cross-examination about his evidence on oath at the committal on 10 June 2014, Mr Fenton agreed that, when he said the appellant said, "I don't care if I go back to jail", Mr Fenton did not say the appellant said anything about shooting. He accepted that what he said at the committal was the truth.[19] In re-examination, over the objection of defence counsel, the prosecutor read from Mr Fenton's original statement to police which was tendered at the committal under s 110A *Justices Act* 1886 (Qld). Mr Fenton agreed that at the committal he said the appellant told him, "I don't give a fuck anymore. I am going back to jail anyway. I don't care, I will shoot you."[20]

[14] Mr Writer gave evidence that, immediately prior to the shooting, there was a bullet on the floor which the appellant put in the shotgun. The appellant lifted the gun up and it "just went off."[21] He could not remember what the appellant and the deceased were saying but they were yelling and swearing.[22] Mr Writer said, "You don't have to do that." The appellant had raised the gun up and it went off "straight ahead" in the direction of the deceased. There was just a single bang. Mr Writer saw the wall go red but did not actually see the deceased as the wall unit was blocking his view. The appellant screamed, jumped up and down and was "like hysterical." Mr Writer ran out the door.[23] He and Ms Pollitt called 000.[24]

[15] Ms Pollitt heard the appellant screaming and looked through the door. His hands were on his head. He was jumping up and down and spinning in circles.[25] Neighbours gave evidence that the appellant was distressed after the shooting. He was yelling for help, crying, panicking; he was emotional and distraught. One neighbour saw him holding the deceased's head in his hands and screaming, apparently trying to stop the bleeding.[26] Another heard him say, "Fuck. Just breathe. Please help. Breathe."[27] The appellant rang 000 but he was so distressed that another neighbour completed the call.[28]

[16] Police and ambulance arrived at about 8.30 pm. The appellant was cradling his knees and crying, "Help her, please help her." Police took him outside. He was hysterical, rolling around on the ground, yelling, "Help her."[29] He covered his face with his hands. He said, "It's all my fault, it's all my fucking fault. Natalie. Natalie."[30] He told police he did not know who had shot the deceased but it was over drugs.[31] The deceased was taken to hospital but by 9.08 pm showed no signs of life.[32]

[17] During field recordings at the scene, the appellant asked police about the deceased's welfare. He said that he had accidently locked her in the unit when he went out and

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18 T3-22, AB 210.
19 T3-41, AB 229; T3-45 – T3-48, AB 233 – 236.
20 T3-69, AB 262.
21 T4-9, AB 278.
22 T4-10, AB 279.
23 T4-13, AB 282.
24 T4-14, AB 283.
25 T4-31, AB 300.
26 T1-67, AB 84.
27 T2-12, AB 97.
28 T1-39, AB 55.
29 T2-17, AB 102.
30 T2-28, AB 113.
31 T2-79, AB 164.
32 T2-52, AB 137.

denied that they were fighting. He claimed that two men arrived at the unit. He did not know them but one had previously robbed him.[33] This man entered, armed with a gun, and told the deceased to sit on the table.[34] The appellant tried to take the gun and it discharged. The appellant said that he was dealing in drugs and that these men stole the drugs and money. He again said that it was all his fault.

[18] Scientific evidence established that the spur of the hammer on the gun, usually pulled back by the thumb, had been shortened. That made it more difficult to control the cocking of the gun and reduced the grip on the hammer.[35] The gun failed the hammer slip test. A hammer is usually designed with a built-in safety measure so that, if the hammer slips whilst being pulled back, the gun does not discharge. This gun was prone to discharge when the hammer was, accidentally or not, released before fully cocked. The hammer was required to be pulled back 16.8 millimetres to fully cock. This gun would discharge when the hammer was only partly cocked and drawn back as little as 10 millimetres.[36] Another built-in safety mechanism, the rebound safety which prevents the hammer from falling unless the trigger was simultaneously depressed, was also compromised.[37] This meant that the gun could be deliberately fired by fully cocking the hammer and then pulling the trigger, but it would also fire if the hammer was partially pulled back and a finger slipped on the shortened spur.[38] Scientific testing of the firing pin impression on the discharged cartridge which killed the deceased showed that the cartridge may have been fired from the fully or almost fully cocked position.[39] The gun was between 15 centimetres and 1.25 metres from the deceased when fired, most likely between 45 and 75 centimetres.[40]

[19] Police found a sawn-off shotgun, a spent cartridge and a knife on the unit floor. They also found, on the other side of a neighbouring fence, two shotgun cartridges matching the discharged cartridge which killed the deceased. One had DNA consistent with that of the appellant and the deceased.[41] Police also found dust marks, the same size and shape as the three cartridges, on a shelf in the appellant's unit. There was a blood smear across one mark.[42]

[20] The appellant did not give or call evidence.

[21] The prosecution contended that the appellant had thrown the two undischarged cartridges, which were similar to the spent cartridge located in the unit, over the neighbouring fence and put the knife on the unit floor, to bolster his false story about a drug robbery. He loaded the gun with the other cartridge, moved towards the deceased, pointed the gun at her, fully or partially cocked the weapon, and deliberately discharged it, either by pulling the trigger or in the cocking process, and with the intent to kill or do her grievous bodily harm.

[22] The defence contended that the prosecution case should not be left to the jury on murder. The trial judge rejected that contention and the case was left to the jury to determine.[43]

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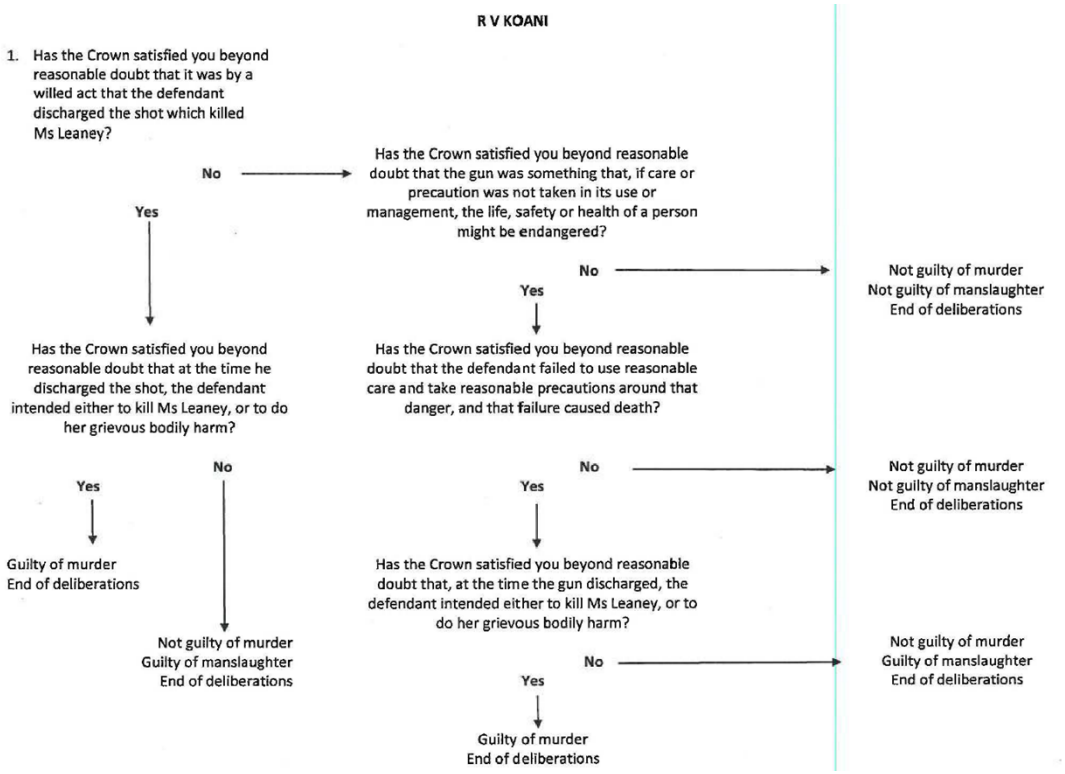
33 Transcript of Police Interview (10 March 2013) 19, AB 536.
34 Above, 21, AB 538.
35 T4-80, AB 349.
36 T4-82, AB 351.
37 T4-99, AB 368.
38 T4-83, AB 352.
39 T4-95 – T4-96, AB 364 – 365.
40 T4-94 – T4-95, AB 363 – 364.
41 T4-48, AB 317.
42 T4-50, AB 319.
43 Ruling (3 November 2015), AB 397 – 407.

The judge's directions to the jury

[23] The judge provided the jury with the following question trail:



[24] Her Honour directed the jury in those terms:

> "So the question number 1:
>
> > *Has the Crown satisfied you beyond a reasonable doubt that it was by a willed act that the [appellant] discharged the shot which killed Ms Leaney*?
>
> So what I said about elements before, this is the first of these elements. The Crown has to satisfy you that there is a willed act, and I will spend a little bit of time talking to you about what does a willed act mean; what does that element mean. All right. So that is the starting point. If you think "Yes, the Crown has satisfied me beyond a reasonable doubt there was a willed act," you progress down that first column and you come to the second of the elements that you will have to consider, and it is this:
>
> > *Has the Crown satisfied you beyond reasonable doubt that at the time he discharged the shot, the [appellant] intended either to kill Ms Leaney or to do her grievous bodily harm?*
>
> And if you wanted to sum that up in a shorthand sort of way, you would call that intention.
>
> So question number 1 relates to willed act, and then the second question, if you want to think about it in a shorthand way, relates to intention. Okay. So if you answer yes to both those questions, you will see where you end up, guilty of murder. That is the end of your deliberations. Do you see that on the sheet? Okay.

If you think, "Yes, there was a willed act. No, there was no intention," see where you end up, not guilty of murder, guilty of manslaughter. So do you see just the flow of that? All right.

We will go back to the willed act. So it is starting again at question 1, if you consider that question "Has the Crown satisfied me beyond a reasonable doubt that there was a willed act?" If you say, "No, I have got a reasonable doubt about that," you do not go down column 1. You move across to column 2, and there is a series of questions there. So you think, "I have got a reasonable doubt about whether there was a willed act," so going over to the first question in column 2, then you consider, "Has the Crown satisfied me beyond reasonable doubt that the gun was something that, if care and precaution was not taken in its use or management, the life, safety or health of a person might be endangered?" And there is a shorthand way of thinking of that. It is really asking you, "Has the Crown satisfied you beyond reasonable doubt that the gun was a dangerous thing?" Okay. So it is a shorthand way of thinking of that question.

If you think, "Yes, I am satisfied of that," you go down to the next question:

> *Has the Crown satisfied you beyond reasonable doubt that the [appellant] failed to use reasonable care and take reasonable precautions around the danger –*

That is the danger posed by the gun –

> *and that that failure, that failure to use reasonable care caused death?*

So if you answer yes to both those questions, if you see the logic of it, you have had a reasonable doubt about whether there was a willed act, but you are satisfied that the gun was dangerous, and that the [appellant] failed to take reasonable care in its management and that that caused death – you see the scheme of where this is going – then you go down to that last question in column 2, and it is very similar to the intention question from column 1. So the scheme of it is that with a reasonable doubt that there was a willed act, but if you are satisfied that the gun was a dangerous thing, and that the [appellant] failed to take reasonable care of it, and that there was an intention at the time it went off, you can still get to murder at the end of the page. Do you see that? Do you see how it is the scheme of it?

Okay. And you will see, if you compare those two intention questions, that the difference between them is that the one in the first column is predicated on you having found that there was a willed act that discharged the gun, so that the intention question in the first column says "at the time he discharged the shot", because you found it was a willed act. But in the second column, by the time you get to the intention, you have had a reasonable doubt about willed act, so you have not found that. And it just says "at the time the gun discharged", not that "he discharged it", because you have had a reasonable doubt about willed act. Okay. So that is the overall scheme of it, and I am

going now to sort of descend into the detail and talk to you about each of these elements, as they are called."[44]

...

So the remaining instructions that I have to give you are about, then, this third question in column 2. And that is because the Crown says, as I said to you at the beginning, if you are following this through, if you ended up looking at this third question in column 2, you have done it because you had a reasonable doubt about the willed act. You are satisfied that the gun was dangerous. You are satisfied there was not proper care taken. You are satisfied that caused death. And then the Crown case is, well, if at the time the gun discharged there was an intention to kill or do grievous bodily harm, that still results in a murder conviction. Okay. Do you see how that works? All right. And as I say, that question in – the third question in the second column's almost the same as the intention question in the first column. So I am certainly not going to go through all that evidence again, but it is the same question really except that the question in the second column, the time you have to be satisfied – and this is very important – is the time the gun discharged. Okay. So that is the time you are looking at to find an intention. So it might just be split seconds after, but it is after the cocking of the gun."[45]

The relevant statutory provisions

[25] The following provisions of the *Criminal Code* (Qld) are apposite:

"**Chapter 5 Criminal responsibility**

…

23 "Intention–motive

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—

(a) an act or omission that occurs independently of the exercise of the person's will; or

(b) an event that–

(i) the person does not intend or foresee as a possible consequence; and

(ii) an ordinary person would not reasonably foresee as a possible consequence.

…"

"**Chapter 27 Duties relating to the preservation of human life**

…

289 Duty of persons in charge of dangerous things

It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate,

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44 Summing Up 7 – 8, AB 455 – 456.

45 Above 29 – 30, AB 477 – 478.

and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty."

…

Chapter 28 Homicide–suicide–concealment of birth

291 Killing of a human being unlawful

It is unlawful to kill any person unless such killing is authorised or justified or excused by law.

…

293 Definition of *killing*

Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.

…

300 Unlawful homicide

Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case.

302 Definition of *murder*

(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—

(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;

...

is guilty of ***murder.***

303 Definition of *manslaughter*

A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of ***manslaughter***.

...".

The appellant's contentions on ground 1

[26] The appellant contends that the judge's directions in allowing the jury to use s 289 *Criminal Code* as a path to a murder conviction were wrong. That provision is directed to criminal negligence and cannot result in a conviction for murder under s 302(1)(a)

Criminal Code. That conclusion is consistent with the High Court's approach in *Murray v The Queen*[46] where no judge suggested that s 289 might have application in circumstances analogous to the present. Gaudron J noted that, unlike the *Crimes Act* 1900 (NSW), s 302(1) *Criminal Code* contained no provisions:

> "permitting a person to be convicted of murder simply for an act done with reckless indifference to human life or done in an attempt to commit or during or immediately after the commission of an act obviously dangerous to human life. Thus, if the act causing death in this case were to be identified as simply presenting the loaded shotgun, that might constitute manslaughter by negligent act, but it would not constitute murder."[47]

[27] On her Honour's analysis, if s 23(1)(a) was not excluded beyond reasonable doubt, the jury would have no need to consider intent under s 289.[48] *Murray*, the appellant submits, supports the conclusion that s 289 becomes relevant only once the jury has rejected the notion that the accused person has done a willed act with murderous intent, and then only as a pathway to manslaughter by way of criminal negligence, not as part of a composite consideration of murderous intent coupled with negligently causing death. The appellant emphasises that murder under s 302(1)(a) is not an offence of negligence. The judge erred in specifically directing the jury that s 23(1)(a) was inapplicable on a criminal negligence path to murder. While s 289 might lead to a conviction of manslaughter despite the absence of a willed act or the relevant intention, it does not remove from consideration the defence or excuse under s 23(1)(a) which might render a person not criminally responsible for an unwilled act in a charge of murder under s 302(1)(a). This conclusion, the appellant submits, is consistent with *Ugle v The Queen*.[49]

[28] The appellant argues there was a view of the facts consistent with innocence on the murder charge. The front door was open at the time the deceased was shot and the events occurred in front of others. His behaviour immediately afterwards was inconsistent with an intention to kill or do serious harm. These were matters capable of supporting a lack of murderous intent in committing an unwilled act. The judge's directions, the appellant contends, were wrong and deprived him of a fair chance of an acquittal on the charge of murder. The conviction for murder should be set aside and a retrial ordered.

The respondent's contentions on ground 1

[29] The respondent contends that the jury were entitled to be satisfied beyond reasonable doubt on the evidence that, at the time the appellant caused the death, he intended to kill or do grievous bodily harm to the deceased. The jury could infer this from his loading of the gun, walking towards her, aiming the gun and cocking it, together with his comment that he would shoot her and the history of their arguments. It is unlikely, the respondent submits, that the legislative scheme established under the *Criminal Code* was intended to allow someone to escape liability for murder where that person has killed another through a deliberately reckless act with an intention to kill or do grievous bodily harm. That conclusion is supported by the non-Code cases of *R v Demirian*[50] and *Royall v The Queen*.[51] There is, the respondent contends, no requirement that s 23

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46 (2002) 211 CLR 193.
47 Above, [15].
48 Above, [17] – [18].
49 (2002) 211 CLR 171; [2000] WASCA 381.
50 [1989] VR 97, 115.
51 (1991) 172 CLR 378.

must be considered if the jury found the appellant acted under s 289 with an intention to kill or do grievous bodily harm. *R v MacDonald & MacDonald*[52] is authority for the conclusion that a breach of duty carried out with an intent to kill or do grievous bodily harm can result in a conviction for murder.

[30] The respondent submits the trial judge correctly ruled that the evidence provided the jury with a pathway to convict of murder on the basis that the gun may have discharged without a deliberate pulling of the trigger, if, at the time the gun discharged, he had an intention to kill or do grievous bodily harm[53]. It would be incongruous if someone could escape liability for murder when, intending to kill or do grievous bodily harm, the faulty gun discharges slightly earlier than intended through reckless handling and kills the victim. Where s 289 is available, the opening words of s 23 make clear that there is no warrant to consider s 23 in exculpation.

[31] The practice in Queensland before *Murray*, the respondent contends, was to direct jurors in a case like this that, if the prosecution proved intent to kill or do grievous bodily harm, accident under s 23(1)(a) was negatived. This meant that the jury would consider s 23(1)(a) only if they considered there was no intent to kill or do grievous bodily harm. On this approach, there was no path to convict of murder by way of breaches of duties imposed by Chapter 27 *Criminal Code* such as those under s 289. That was why there were no cases other than *MacDonald* where an accused person was convicted of murder by that path. The respondent submits that the comments relied on by the appellant in *Murray* and *Ugle* are of limited assistance as the point in consideration in this case was not raised there.

Conclusion on ground 1

[32] My review of the evidence demonstrates that the jury could conclude beyond reasonable doubt that, at the time the gun discharged killing the deceased, the appellant intended to kill her or at least do her grievous bodily harm. There was also evidence which would allow the jury to conclude it was reasonably possible the appellant intended only to frighten the deceased when the gun discharged. The unchallenged expert evidence was that the gun would not have discharged and killed the deceased unless the appellant, at a minimum, cocked the hammer by pulling it back at least 10 millimetres and then released it, perhaps because his finger slipped on the shortened spur.[54] It was for the jury to determine what willed act or acts were done or not done by the appellant and, if done, whether they caused the death.[55] The jury could find beyond reasonable doubt that the appellant's cocking and release of the hammer caused the discharge of the gun and was a willed act under s 23(1)(a). If also satisfied beyond reasonable doubt that he intended to kill or do grievous bodily harm when his willed act discharged the gun, they would convict him of murder; it would not matter that he did not expect the gun to discharge until later when he planned to pull the trigger.[56]

[33] If, however, the jury considered his finger may have slipped on the shortened spur, releasing the hammer, so that the discharge of the gun was not a willed act, then, subject to s 289, he was not criminally responsible under s 23(1)(a).

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52 [1904] St R Qd 151, 169 – 170.
53 Ruling (3 November 2015), AB 397 – 407.
54 See these reasons at [18].
55 *Murray* (2002) 211 CLR 193, 198 [13].
56 See Gaudron J's discussion of what constitutes an "act" in the context of firearm cases in *Murray* (2002) 211 CLR 193, 196 – 198 [7] – [12].

[34] The appellant did not rely on s 23(1)(b), no doubt because it was an unpromising defence given the appellant loaded the gun, pointed it in the direction of the deceased, and must have at least partially cocked the hammer.[57] As the case was left to the jury, they need only consider s 289 if they had a reasonable doubt as to whether the appellant did a willed act causing the gun to discharge under s 23(1)(a).

[35] The question in this ground of appeal is whether, where s 23(1)(a) otherwise provides an excuse, a breach of duty under s 289 can result in a conviction for murder under s 302(1)(a) rather than manslaughter, under s 300. The answer requires a consideration of the terms of the relevant provisions of the *Criminal Code*.

[36] The approach to s 289 and s 302(1) taken by the prosecutor and accepted by the trial judge is novel. Until this case, it had always been understood under the *Criminal Code* that a person who kills another through a breach of the duty imposed by s 289 is guilty of manslaughter, not murder. But is that only because the prosecution has never before alleged a breach of s 289 causing death, combined with a contemporaneous intent to kill or do grievous bodily harm is murder?

[37] A breach of duty under s 289 is commonly referred to as "criminal negligence" and I have difficulty in apprehending how a criminally negligent act can result in a conviction for an intentional offence. As Keane JA (as his Honour then was) explained in *R v Clark*:[58]

> "a contravention of the duty imposed in s 289, does not depend upon an intention to cause harm: the gravamen of the contravention lies in the failure to use 'reasonable care and take reasonable precautions to avoid' danger to life, safety and health. Whether there has been a failure in this sense on the part of an accused person does not depend upon an intention to cause harm but upon a failure to take reasonable steps to avoid danger."

[38] Under s 23(1)(a), the appellant was not criminally responsible for the act causing the discharge of the firearm which killed the deceased (the 'event' under s 23(1)(b)) unless the prosecution established beyond reasonable doubt that the act did not occur independently of the exercise of his will. If the jury had a reasonable doubt on this issue it had to consider "the express provisions of this Code relating to negligent acts and omissions". There are no longer any provisions of the *Criminal Code* which in express terms relate to "negligent acts and omissions" but it is uncontentious that those exact words need not be used in order for the provisions to be "express provisions relating to negligent acts and omissions".[59] The phrase includes criminally negligent breaches of duty under Chapter 27 and has long been construed as applying to s 289.[60] As Kirby J explained in *Stevens v The Queen*:

> "…a consideration of manslaughter will often be required when s 23(1) of the Code is invoked. The opening words of s 23(1), with their cross-reference to 'express provisions of this Code relating to negligent acts and omissions,' makes this inevitable. If such other provisions apply, the total exemption from criminal responsibility

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57 T4-105, l 24 – l 30, AB 394.

58 [2007] QCA 168, [23].

59 *R v Young* [1969] Qd R 417, 441 – 443 (Lucas J); 444 (Hoare J).

60 See *Murray* (2002) 211 CLR 193, [18] (Gaudron J); [88], [90] (Kirby J); [137] (Callinan J). See also *Ugle* (2002) 211 CLR 171, [5] (Gaudron J); [24] (Gummow and Hayne JJ); [55] (Kirby J); [74] – [75] (Callinan J).

> provided by s 23 does not operate. Moreover, the references in s 23(1) to acts and omissions occurring independently of the exercise of the person's will…direct the mind to the possibility of manslaughter by criminal negligence."[61]

[39] The 1904 case of *MacDonald* is the only instance to which this Court has been referred where there has been a conviction for murder on the basis of an intention to kill coupled with a breach of duty of a provision under Chapter 27, namely s 285 (Duty to provide necessaries). *MacDonald* is clear authority that a breach of the s 285 duty coupled with an intent to kill is murder.[62] But unlike s 285 and the other provisions of Chapter 27, a duty is imposed in s 288 based on "reasonable skill and…care" and in s 289 "to use reasonable care and take reasonable precautions". I find it incongruous that provisions which are expressed in terms of objective reasonableness can be coupled with a specific intent to kill or do grievous bodily harm. As Lucas J observed in *Young* when discussing s 288 and s 289, those "sections clearly relate to negligence and to nothing else."[63] That approach is consistent with Kirby J's observations in *Stevens* and Keane JA's observations in *Clark*.

[40] If the jury had a reasonable doubt as to whether the appellant's willed act discharged the gun, s 23(1)(a) required them to consider s 289. A jury may have little difficulty in concluding that a gun was something which, "in the absence of care or precaution in its use…the life, safety or health of others may be endangered." It may also have little difficulty in concluding that the appellant therefore had a duty "to use reasonable care and take reasonable precautions to avoid such danger", breached that duty and "is held to have caused any consequences", here, the deceased's death. Indeed, it is uncontentious in light of the appellant's guilty plea to manslaughter, that his criminal negligence in handling the loaded gun caused it to discharge and kill the deceased. Under s 291 it is unlawful to kill a person unless authorised, justified or excused by law. As s 23(1)(a) is subject to s 289, the killing was not authorised, justified or excused by law under s 291. It followed that, under s 300, he would be guilty of either murder or manslaughter. I consider that, unlike breaches of some other duties under Chapter 27, a breach of the objective standards applicable to the duty under s 289 can support only a conviction for manslaughter under s 303, and not murder under s 302(1)(a). To convict the appellant of murder, the prosecution was required to prove beyond reasonable doubt that the appellant's willed act discharged the gun, killing the deceased, and that he contemporaneously intended to kill or do grievous bodily harm. Although the judge left that pathway for the jury to convict of murder, it is impossible to know if they took it rather than the s 289 pathway in reaching their verdict of guilty of murder.

[41] *Demirian* and *Royall* do not assist in answering the question posed. They did not involve statutory provisions of the kind to those with which this case is concerned and highlight the distinction between cases of murder under the *Criminal Code* and those at common law, as discussed by Gaudron J in *Murray*.[64]

[42] I consider her Honour was wrong to direct the jury that, if the prosecution failed to prove beyond reasonable doubt that the discharge of the gun was a willed act under s 23(1)(a), but proved beyond reasonable doubt his criminal negligence under s 289 and a contemporaneous intent to kill or do grievous bodily harm, they could convict of murder. An unwilled act under s 23(1)(a) causing death arising out of a breach of

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61 (2005) 227 CLR 319, 342 [67].
62 See *Young* [1969] Qd R 417, 433 (Lucas J); 444 (Hoare J agreeing).
63 Above, 441; 444 (Hoare J agreeing).
64 *Murray* (2002) 211 CLR 193, [15].

the s 289 duty can result only in a conviction for manslaughter, not murder. The respondent raises the concern that my construction would result in an offender escaping liability for murder if, intending to kill or do serious harm, the offender killed someone by discharging a faulty gun in an unwilled act through a breach of s 289, slightly earlier than intended. I consider this concern does not give sufficient consideration to the fact that it is a matter for the jury to determine whether the act resulting in the discharge of the gun causing death was a willed act under s 23(1)(a); that under s 23(1)(b) the prosecution need only establish the subjective and objective foreseeability of the death; and that, if a conviction for manslaughter rather than murder results, the maximum penalty for manslaughter is life imprisonment and it is for the trial judge to determine the appropriate sentence. Although, the respondent's contentions are persuasive, I cannot, absent clear authority, adopt a construction of s 289 which allows a breach of it to result in a murder conviction. In my view, this ground of appeal is made out.

[43] The respondent does not contend that s 668E(1A) *Criminal Code* can apply if the appellant is successful on this ground. That concession is rightly made. If my construction of the relevant provisions is correct, the jury may have convicted the appellant of murder by a path that was not lawfully open.

[44] I would allow the appeal against conviction, set aside the verdict of guilty of murder and order a retrial.

The appellant's contentions on ground 2

[45] As I would order a retrial in which the issue raised in the second ground of appeal, a matter of some general importance, may again arise, it is desirable I deal with it.

[46] The appellant emphasises that Mr Fenton's evidence[65] as to what the appellant said prior to shooting the deceased was central to the issue of intent. At the conclusion of his cross-examination, the jury could have comfortably concluded that the appellant had made no threat to kill or shoot the deceased before arming himself. The re-examination resulted in inadmissible evidence being lead of his prior consistent statement. In directing the jury, the judge referred to this as a "very important part of the evidence"[66] and reminded the jury of it.[67] After deliberating for about an hour and a half, the jury asked for a transcript of Mr Fenton's evidence.[68] The jury appeared to place great weight on this evidence, the appellant contends, as about 30 minutes later they returned with a guilty verdict.

[47] The appellant submits that the trial judge erred in allowing the prosecutor to re-examine Mr Fenton as to what he said in his statement to police. This evidence did not come within any recognised exception to the rule against hearsay evidence. The trial judge, the appellant contends, was wrong to rely on *Wentworth v Rogers (No 10)*[69] and to treat Mr Fenton's statement tendered at committal under s 110A *Justices Act* 1886 (Qld) as if it had been given at the committal as oral evidence in chief. The prosecution could have but did not lead evidence in chief from Mr Fenton at the committal hearing. Nothing in s 110A makes Mr Fenton's written statement to police,

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65 Discussed at [13] of these reasons.
66 Summing Up, 21, l 24, AB 469.
67 Summing Up, 14 – 19, AB 463 – 467.
68 Redirections (4 November 2015) 37, AB 485.
69 (1987) 8 NSWLR 398, 409.

made long before the committal, oral evidence at the committal. To allow the prosecution to re-examine in this way would mean that an accused person is bound by a witness's original version to police, no matter what the witness may later say on oath at committal or trial. This was concerning as the police taking of witness statements may be in less than optimal circumstances, is not recorded, and is relatively inscrutable. The oral committal evidence, the appellant submits, is not a continuation of the sworn statement of Mr Fenton taken by police. The appellant contends that Mr Fenton's re-examination was not about his testimony on which he was cross-examined but related to an entirely different version provided on an earlier occasion. The wrongful admission of the evidence could have affected the jury verdict and, the appellant contends, has therefore occasioned a miscarriage of justice.

The respondent's contentions in ground 2

[48] The respondent relies on *Cross on Evidence*[70] as authority for the proposition that previous consistent statements can be put to a witness in re-examination if rendered admissible by the terms of the cross-examination, or to refresh memory. The statement, the respondent emphasises, was not admitted in evidence at trial; Mr Fenton adopted portions of it in oral testimony. This was akin to the witness refreshing his memory as to specific parts of it. The admissibility of the evidence was supported by a body of Australian jurisprudence.[71] Prior consistent statements of a witness are generally not admissible but a suggestion that a witness's testimony was an afterthought is a recognised exception. It is not necessary to expressly suggest the statement is a recent invention.[72] The respondent emphasises that, in cross-examination at trial, defence counsel read to Mr Fenton lengthy slabs of cross-examination at the committal, which Mr Fenton agreed was his testimony at that time, and that he did not then say he heard the appellant threaten to shoot the deceased. He agreed that he had no reason to now change what he had then said and accepted that what he said at the committal covered everything that happened in the unit and everything he heard the appellant say. The effect of this, the respondent contends, was to leave the impression that Mr Fenton had at no stage prior to the trial made reference to the appellant saying to the deceased "I'll shoot you". As the trial judge identified, that had the potential to leave the jury with the false impression that this was the totality of Mr Fenton's only account in the matter. The impugned re-examination was properly allowed.

[49] The respondent further contends that, as Mr Fenton's statement was tendered at committal under s 110A *Justices Act*, it was admissible under s 110A(6A) as evidence to the same effect as if its contents had been given orally; s 110A(12) provides that the statement should have the same effect as if it was the deposition of the witness. Mr Fenton's statement was part of his committal evidence. As the trial judge identified, if the re-examination were not permitted, the jury would have been left with an incorrect impression as to the true effect of his evidence at committal. The evidence was properly admitted.

The relevant provisions of the *Justices Act*

[50] In light of the respondent's contentions it is helpful to set out the relevant provisions of the *Justices Act*. Part 5 deals with Proceedings in case of indictable offences, and Division 5, Examination of witnesses, contains s 103B to s 111. Under s 104 the

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70 J D Heydon (ed), *Cross on Evidence* (LexisNexis, 8th ed, 2010) [17605].

71 *Wojcic v Incorporated Nominal Defendant* [1969] VR 323, 326; *R v Phair* [1986] 1 Qd R 136, 137; *Wentworth* (1987) 8 NSWLR 398.

72 *Wentworth* (1987) 8 NSWLR 398, 401.

prosecution is to adduce the evidence upon which it relies at an examination of witnesses in relation to an indictable offence. Section 110A relevantly provides:

> "**110A Use of tendered statements in lieu of oral testimony in committal proceedings**
>
> …
>
> (3) If a written statement of a witness is tendered to [the justices] by the prosecution, the justices–
>
> (a) must, subject to the provisions of this section being satisfied, admit the statement as evidence; and
>
> …
>
> (6) If a witness is cross-examined … the justices must consider both the witness's written statement and the oral evidence given by the witness.
>
> (6A) If a written statement is admitted as evidence … the statement–
>
> (a) is taken to be evidence given or a statement made under section 104 upon an examination of witnesses in relation to an indictable offence; and
>
> (b) is admissible as evidence to the same extent as it would be if the contents of the statement had been given by the oral evidence of the person who made the written statement.
>
> …
>
> (6C) A written statement tendered by … the prosecution must not be admitted unless–
>
> (a) a copy of it has been made available, by or on behalf of the party proposing to tender it, to the other party or parties; and
>
> (b) when the copy was made available, the party proposing to tender it advised that the copy was being made available with the intention that the written statement be admitted under this section; and
>
> (c) it is signed by the person making it and contains a declaration by the person under the *Oaths Act 1867*, or a written acknowledgment by the person, to the effect that–
>
> (i) the statement is true to the best of the person's knowledge and belief; and
>
> (ii) the person made the statement knowing that the person may be liable to prosecution for stating in it anything that the person knew was false.
>
> …

(7) Where some of the evidence before justices consists of written statements admitted in accordance with this section and some of the evidence is evidence given orally by witnesses upon their examination under this part, the justices shall, when all the evidence to be offered on the part of the prosecution is before them, consider such evidence and determine whether it is sufficient to put the defendant upon trial for an indictable offence, whereupon the provisions of this part shall apply as in the case of an examination of witnesses where there are no written statements admitted pursuant to this section.

…

(12) A written statement admitted in accordance with this section shall have effect as if it is the deposition of the witness whose statement it is, and it may be used at the trial of the defendant in the same manner, to the same extent and for the same purpose as a deposition may be used.

(13) A written statement admitted in accordance with this section may, when the defendant has been committed by justices to be tried for an indictable offence, without further proof be read as evidence on the trial of the defendant, whether for the offence for which the defendant has been committed for trial or for any other offence for which an indictment shall be presented, arising out of the same transaction or set of circumstances as the offence for which the defendant has been committed for trial, and whether or not combined with other circumstances, if–

(a) the written statement purports to be signed in the manner prescribed by the person making it and by the justices before whom it purports to have been tendered as evidence; and

(b) the conditions mentioned in section 111(3)(a), read with the words 'written statement' substituted for the word 'deposition' where twice occurring, is satisfied."

[51] Section 111(3)(a) concerns depositions of those who are "dead or insane, or so ill as not to be able to travel, or to be kept out of the way by means of the procurement of the accused or on the accused's behalf".

Conclusion on ground 2

[52] The provisions I have extracted from the *Justices Act* make clear that Mr Fenton's statement, signed under the *Oaths Act* 1867 (Qld) and tendered at the committal proceedings under s 110A, was as much evidence as his oral cross-examination. Mr Fenton's cross-examination at trial, discussed in [13] of these reasons, was not unequivocally limited to his oral cross-examination at committal but often referred to in more general terms to his "evidence in the Magistrates Court".[73]

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[73] See, eg, T3-40, l 30, AB 228; T3-41, l 38, l 47, AB 229; T3-42, l 33, AB 230; T3-45, l 11, AB 233; T3-48, l 26, AB 236; T3-50, l 31, AB 238; T3-52, l 46, AB 240.

[53] It is well established that a party is entitled "in re-examination, to elicit from [the] witness facts which explain away or qualify facts which have been elicited…in cross-examination, and which are in themselves prejudicial to the party's case or the witness's credit, or from which prejudicial inferences could be drawn."[74] As the New South Wales Court of Appeal noted in *Wentworth*:

> "The rule marches in tandem with the related principle that when a witness has been cross-examined as to part of a written or oral statement made by him, examining counsel becomes entitled to prove in re-examination such other parts of the statement as are necessary to explain or qualify it; *Meredith v Innes* (1930) 31 SR (NSW) 104 at 112; 48 WN 5 at 6-7".[75]

[54] The impugned re-examination and the evidence adduced was admissible as it explained fairly to the jury the history of Mr Fenton's statements about a matter on which they may have had an inaccurate view if re-examination was not permitted.

[55] For these reasons I consider the appellant's second ground of appeal is not made out.

Orders

[56] As in my view the appellant should succeed on his first ground of appeal, I would allow the appeal against conviction, set aside the verdict of guilty of murder, and order a retrial.

[57] **GOTTERSON JA and ATKINSON J:** We gratefully adopt the analysis by McMurdo P of the issues in this appeal and her Honour's thorough analysis of the evidence led at the trial. We agree with her Honour's reasons for concluding that the second ground of appeal is without merit. We have, however, come to the view that the first ground of appeal must also be rejected. These are our reasons for coming to that conclusion.

[58] The question in issue in this appeal is whether or not it is open to a jury to consider whether a person is guilty of murder through a negligent act or omission. The learned trial judge ruled that it was.[76]

The *Criminal Code* provisions

[59] The duty of a person in charge of a dangerous thing, as the gun was in this case, is found in s 289 of the *Criminal Code*. That section provides:

> "**289 Duty of persons in charge of dangerous things**
>
> It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, **and** the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty." (emphasis added)

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74 *Wojcic* [1969] VR 323, 326 and the cases and authorities there cited; *Phair* [1986] 1 Qd R 136, 137.
75 (1987) 8 NSWLR 398, 409.
76 *R v Koani* [2016] 2 Qd R 373; [2015] QSC 325 at [41]–[42].

If the consequence of the breach of duty is death, then the person is held to have caused that death by reason of any omission to perform the duty.[77]

[60] Under s 293 of the *Criminal Code*, except as set forth after that section, "any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person." The causal connection sufficient to satisfy this definition is "very broadly expressed."[78] It is apt to include a causal connection established by the operation of s 289.[79] It follows that if by reason of a negligent act or omission of which s 289 speaks the appellant caused the death of the deceased, he is deemed by s 293 to have killed her.

[61] Section 291 of the *Criminal Code* provides that it is unlawful to kill any person unless such killing is authorised or justified or excused by law. Section 300 then provides that "any person who unlawfully kills another is guilty of a crime, which is called murder, or manslaughter, according to the circumstances of the case." The "circumstances of the case" which separate murder from manslaughter are found in s 302 of the *Criminal Code*.[80]

[62] The relevant circumstance in the present case is that contained in s 302(1)(a) of the *Criminal Code*, namely that "…the offender intends to cause the death of the person killed or …the offender intends to do the person killed …some grievous bodily harm." Thus, if the prosecution were to prove the relevant intent, beyond reasonable doubt, the offender would be guilty of murder. If the relevant intent was not so proved, then, by s 303 of the *Criminal Code*, the offender would be guilty of manslaughter rather than murder.

Relevance of s 23 of the *Criminal Code*

[63] The appellant has submitted that there was a view of the facts consistent with innocence on the murder charge. He argued that the jury could have found that he lacked murderous intent in committing an unwilled act.

[64] The reliance on there being an unwilled act raises s 23 of the *Criminal Code*, which relevantly provides:

> "(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
>
> (a) an act or omission that occurs independently of the exercise of the person's will…"

[65] This defence, which appears in Chapter 5 of the *Criminal Code* dealing with criminal responsibility, is stated to be subject to the express provisions of the *Criminal Code*

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77 There is no exception in s 289 where the consequence of death is caused to a person by reason of an omission to perform the duty imposed by the section.

78 Per Philp J in *Humphries v The King* [1943] St R Qd 156 at 170.

79 The comprehensive terms in which causal connection is expressed in s 293 do not displace causation established under s 289, for the purposes of the section. Section 289 complements those comprehensive terms by assigning criminal responsibility to the causation of death by an omission to perform the duty imposed by it.

80 This section is said to be applicable "[e]xcept as hereinafter set forth". That phrase refers to sections of the *Code* dealing with killing as a result of provocation under s 304, diminished responsibility under s 304A and killing for preservation in an abusive domestic relationship under s 304B. None of those sections is relevant to this case.

relating to negligent acts and omissions. It is uncontroversial that s 289 is just such a section.

[66] Thus, if the jury were satisfied that the duty in s 289 of the *Criminal Code* was breached by the appellant, it would not matter if he had killed the deceased by an unwilled act; he could not in those circumstances rely on s 23 to provide a defence to his actions. The language of the *Criminal Code* is unambiguous in this respect.

[67] Put another way, if the appellant were found to have breached the duty in s 289 of the *Criminal Code* and the consequence of that breach was the death of the deceased, he is deemed by s 293 to have killed the deceased and that killing is unlawful as it is not justified or excused by s 23 (and no other defence was submitted to be available).

[68] It follows that there was no difficulty in the trial judge directing the jury to consider s 289 if they were not satisfied the prosecution had established that the appellant killed the deceased by a willed act.[81] It also follows, *prima facie*, that there was no difficulty in the trial judge going on to direct the jury that, if satisfied the duty in s 289 was breached, they should consider whether the unlawful killing established by that breach was murder or manslaughter by reference to the element of intent.

Is there a conceptual problem with murder via s 289?

[69] As explained above, a plain reading of the *Criminal Code* provisions leads to the conclusion that a breach of the duty in s 289 would, in the circumstances of this case, constitute an unlawful killing. There is no express limitation in the *Criminal Code* to confine an unlawful killing in such circumstances to manslaughter rather than murder.

[70] Nonetheless, the appellant has submitted that s 289 is directed to criminal negligence and cannot result in a conviction for murder under s 302(1)(a). While we agree that s 289 is directed to what is often called "criminal negligence", it does not follow from this that a murder conviction cannot result.

[71] It is true, as Keane JA said in *R v Clark*, that "the gravamen of the contravention [of s 289] lies in the failure to use 'reasonable care and take reasonable precautions to avoid' danger to life, safety and health."[82] It is also true that such a failure "does not depend upon an intention to cause harm but upon a failure to take reasonable steps to avoid danger."[83] However, the fact that a contravention of s 289 does not *depend* on murderous intent does not mean that where such an intent is present the contravention cannot be classified as murder.

[72] Moreover, there is in our opinion nothing incongruous about provisions expressed in terms of objective reasonableness being coupled with specific intent to kill or do grievous bodily harm. The issue of the objective reasonableness of a person's actions is quite distinct from the issue of the person's intent whilst carrying out those actions. They speak to two independent steps. The former relates to proving the act or omission

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81 As her Honour did at AB477 l39 – AB478 l7. She had already directed the jury that, as particularised, the relevant act was the causing of the gun to discharge and that, on the evidence, the discharge might have been effectuated as a willed act by pulling the trigger of the gun fully cocked or, in the case of a person who knew of the gun's "peculiarities and faults", by pulling the hammer back until it was almost fully cocked and then letting it go: AB456 ll30-37. This latter direction is uncontentious.

82 (2007) 171 A Crim R 532; [2007] QCA 168 at [23]. His Honour there observed that where the danger is extreme and obvious, as it is in cocking and aiming a gun, deliberate and active diligence will be required to discharge the duty of reasonable care imposed by the section.

83 Ibid.

that caused the death (the *actus reus*) while the latter relates to establishing the relevant state of mind, namely intent (the *mens rea*).

[73] As noted by the President, Lucas J in *Young* observed that sections 288 and 289 "clearly relate to negligence and to nothing else".[84] But negligence is not synonymous with manslaughter.[85] Negligence, in the context of s 289, simply means a failure to exercise reasonable care and precautions with a "dangerous thing". Where a death is caused by it, that failure could constitute murder or manslaughter depending on the circumstances. Manslaughter, pursuant to s 303, is defined as an unlawful killing that arises other than in circumstances which constitute murder. If there is an unlawful killing coupled with the relevant intent then the killing is murder and not manslaughter.

[74] A breach of s 289 resulting in death may be effected by an act or an omission which is intentional, as in an act or omission done consciously, or unintentional, as in an inadvertent act or omission, or a series of such acts or omissions. In either case, the breach will be a breach of the section because of a failure to use reasonable care and to take reasonable precautions to avoid the relevant danger, regardless of whether the act or omission was intended or not. Whilst it is true that in either case the breach may be called criminal negligence, in the eyes of the criminal law it was the cause of the death (s 289) and the death so caused was by an unlawful killing (s 293).

[75] Sections 302(1)(a) tells us that where a person unlawfully kills another in the circumstance that the person intended to cause the other's death or do the other person grievous bodily harm, the unlawful killing is murder. Where there is no such intent (and absent any other circumstances listed in s 302(1)), s 303 tells us that is it manslaughter.

[76] Under s 289, the failure to take reasonable care and precaution in the use of a dangerous thing renders the offender criminally culpable for the consequences of that failure. Where death results, the killing is unlawful. If the unlawful killing is accompanied by the intent of which s 302(1)(a) speaks, the killing is murder.

[77] Where a person who holds a murderous intent towards another picks up a gun to shoot the other person and, as a result of a failure on the person's part to take reasonable care and precaution, the gun discharges, it would be incongruous that, because the gun discharged earlier and not in precisely the way the person intended, the person who kills is guilty of manslaughter and not murder. Such an outcome would be almost paradoxical and would fail sufficiently to take into account the fact that the person unlawfully killed, intending to kill.

Relevance of *Murray v The Queen*

[78] Does the High Court's decision in *Murray v The Queen*[86] give any reason to doubt the above analysis? It is a case that concerned facts similar to those of the present case. However, two points may immediately be made about the High Court decision. First, the case was decided on the basis of a failure by the trial judge to direct accurately as to the onus of proof. Therefore, additional remarks by the judges are strictly *obiter dicta*. Second, the issue of whether s 289 can form a step in a pathway to a murder conviction appears not to have been specifically raised before the Court. Certainly, that question is not one acknowledged by any member of the Court. It appears that s

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84 [1969] Qd R 417 at 443.

85 For a detailed discussion of the state of the civil law regarding intentional negligence see Peter Handford, 'Intentional Negligence: A Contradiction in Terms?' (2010) 32 *Sydney Law Review* 29.

86 (2002) 211 CLR 193; [2002] HCA 26.

289 was put to the jury as a path to manslaughter only and that it could have been used as a pathway to murder was not argued.

[79] In those circumstances, it is unsurprising that there is little in the decisions of the various judges in that case to assist in resolving the present issue. It is true that certain comments of Gaudron J could be construed as supporting the appellant's contention.[87] However, none were directed to the specific issue raised in this case. They do not have the status of considered dicta with respect to it.

[80] At [18], her Honour reasons that it is only if the jury was satisfied that the prosecution had excluded the possibility that the act causing death was an unwilled act could they go on to consider the issue of intent. Gaudron J does not address the question whether that possibility could be excluded, or rendered immaterial, by operation of s 289. This is because, as is evident from [15] of her Honour's reasons and footnote 36 in particular, Gaudron J considered that section as one associated with charges of manslaughter rather than murder. Why this should be so is not discussed. For the reasons discussed above, it is not a section so confined.

Conclusion

[81] It follows from the above that there is, and was in this case, an alternative route to a finding of guilt for murder through the process which we have set out. It was appropriately depicted by the learned trial judge in the question trail as an alternative to a willed act carried out with an intention to cause death or grievous bodily harm. The reasoning process that the jury was asked to undertake by the alternative route was as follows:

1. Has the Crown satisfied you beyond reasonable doubt that the gun was something that, if care or precaution was not taken in its use or management, the life, safety or health or a person might be endangered?

   If the answer is yes, then the jury must go on to consider the next question. If the answer is no, then the defendant is not guilty of murder or manslaughter.

2. Has the Crown satisfied you beyond reasonable doubt that the defendant failed to use reasonable care and take reasonable precautions around that danger, and that failure caused death?

   If the answer is yes, then the jury must go on to consider the next question. If the answer is no, then the defendant is not guilty of murder or manslaughter.

3. Has the Crown satisfied you beyond reasonable doubt that, at the time the gun discharged, the defendant intended either to kill Ms Leaney or to do her grievous bodily harm?

   If the answer is yes, then the defendant is guilty of murder. If the answer is no, then the defendant is guilty of manslaughter and not guilty of murder.

[82] The first question addresses the factual question required to be answered in the affirmative if the duty set out in s 289 can be proved to arise. The second question deals with the effect of the failure to fulfil that duty if death is the consequence of that failure, combining the factual questions embedded in those circumstances in the second half of s 289. The legal consequences of s 291, s 293 and s 300 follow from the answer to the first two questions.

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87 See especially at 199-201 [15]-[18].

[83] The consequence of an affirmative answer to those two questions is that the appellant was found by the jury to have unlawfully killed Ms Leaney, which is murder or manslaughter according to the circumstances of the case.

[84] The third question posed then deals with the circumstances of the case which distinguish murder from manslaughter under s 302(1)(a). Given an affirmative answer, the jury determined that the defendant was guilty of murder rather than manslaughter.

[85] Accordingly, we would dismiss the appeal.

Order

[86] The appeal is dismissed.